TAN GEOK LAN

v.

LA KUAN

COURT OF APPEAL, KUALA LUMPUR
MOKHTAR SIDIN JCA
MOHD SAARI YUSOFF JCA
ABDUL AZIZ MOHAMAD JCA
[CIVIL APPEAL NO: W-02-32-1997]
30 NOVEMBER 2002

CIVIL PROCEDURE: *Settlement - Solicitors, settlement before trial by - Trial judge allowed defendant to depart from settlement and ruled case to proceed to trial - Whether trial judge erred in allowing defendant to do so - Whether parties were not bound by settlement as trial judge had not made an order - Whether settlement was an attempt by plaintiff to dictate to court manner of resolving dispute*

The plaintiffs brought an action against the defendant, *inter alia*, for breach of contract. Before the trial of the action commenced, the plaintiffs' counsel informed the court that the parties had agreed to settle their dispute as framed in encl. 37. Enclosure 37 stated two questions of fact and that the parties would abide by the answers given *via* the affidavit evidence of solicitor Mr Proctor. It was not disputed that if Mr Proctor answered the two questions of fact in the affirmative, the first plaintiff would fail in her claim and if answered in the negative, she would succeed. Mr Proctor answered them in the negative and when his affidavit was before the court, the events that followed led to the defendant's counsel discharging himself from acting for the defendant. The court then adjourned the matter to enable the defendant to retain another counsel. When the matter came up again before the trial judge, the defendant's present counsel urged the court to proceed to trial despite encl. 37 as it would be unjust if the defendant was not able to cross-examine the plaintiffs and their witnesses. Also, that encl. 37 was an attempt by the plaintiffs to dictate the terms and procedure of the trial which was not permitted by the case of *Ashmore v. Corp of Lloyd's*. The trial judge held that since she had not made an order pertaining to encl. 37, the parties were not bound by it. She then made a ruling that there would be a full trial. Hence, the first plaintiff's appeal to this court.

The issue was whether encl. 37 was a consent judgment binding the parties.

Held:

Per Mokhtar Sidin JCA (majority)

[1] It was wrong for the plaintiff's counsel to refer to encl. 37 as a consent judgment. Enclosure 37 was nothing more than a proposed settlement by the plaintiffs that was never accepted by the defendant. Further, the affidavit of Mr Proctor did not state that the defendant had agreed or gave an indication to pay the sum claimed by the first plaintiff. (pp 254 a & 255 c)

[2] A consent judgment is binding on both parties even if entered by the counsel without the instruction of the party that had appointed him. In the present appeal, there was no consent order and the earlier counsel for the defendant withdrew from representing the defendant when the defendant refused to follow instructions from him. (p 256 g-h)

[3] As the trial judge refused to record encl. 37 as a consent judgment, the plaintiffs could not come to this court and insist that she change her view and record encl. 37 as a consent judgment. That was within the discretion of the trial judge. The trial judge was right when she said that encl. 37 was an attempt by the plaintiffs' counsel to dictate the terms and procedure of the trial which was not permitted by *Ashmore*'s case. (pp 257 g-h & 258 a-b)

Per Mohd Saari Yusoff JCA (majority)

[1] The issue for determination was whether there was a consent order in full force as alleged by the plaintiffs. It was noted that the parties had agreed to be bound by the affidavit of Mr Proctor. The case was also adjourned to enable Mr Proctor to file his affidavit. However, as there was nothing to suggest that the terms of the settlement was recorded and pronounced by the court, my finding on this issue was in the negative. (pp 259 a, h & 260 d)

Per Abdul Aziz Mohamad JCA (dissenting)

[1] The defendant had not objected when the plaintiffs' tendered encl. 37 as a settlement between the parties. That meant that the defendant had agreed that encl. 37 constituted a settlement between the parties. Further, the trial judge postponed the trial to enable Mr Proctor to file his affidavit. That act of the trial judge, although it was not an express directive to Mr Proctor to file his affidavit, signified that the judge recognised encl. 37 as an agreement to settle the dispute between the parties. (p 262 c-d)

[2] This was not a case of a consent order but a case of an agreement reached between the parties and manifested to the court as to the manner of resolving certain issues of fact that existed between them. Agreements between parties and manifested to the court are a common and essential feature of the conduct of civil litigation. Such agreements are good and are to be encouraged because they expedite the disposal of cases. No orders need be made on them. The parties have to be bound by them even though the consequences may not be favourable to one party, as otherwise they will mean nothing and will not serve their purpose. If any party wishes to resile from such an agreement or vary any term of it, he must, with the consent of the other party, make a formal application supported by an affidavit setting out the relevant facts. (p 265 c-g)

[3] The judge erred in principle when she ruled that the agreement did not bind the parties because she had not made an order in terms of the agreement. She also erred in principle when she gave consideration to the unfairness to the defendant of the consequence of the agreement, particularly when the likelihood of such a consequence was foreseeable when the agreement was made. (p 265 h)

[4] The case of *Ashmore* emphasised that it was the court and not the plaintiff in control of proceedings in a dispute as to the most expeditious and inexpensive way of conducting the trial of an action to achieve justice. That case is not appropriate to be used as an authority that where the parties have agreed on an expeditious way of determining the dispute between them, they are dictating to the court about the manner of resolving the dispute. Also, that the court may hold a party not bound by an agreement for no better reason than that the manner chosen and agreed to will result adversely to that party. (p 267 b-d)

[Appeal dismissed by a majority.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Plaintif-plaintif membawa tindakan terhadap defendan, *inter alia,* untuk kemungkiran kontrak. Sebelum perbicaraan bermula, peguam plaintif maklumkan mahkamah bahawa pihak-pihak kes telah mencapai penyelesaian seperti terkandung di dalam kandungan 37. Kandungan 37 mengandungi dua soalan fakta dan dipersetujui bahawa pihak-pihak akan mematuhi jawapan berkenaan soalan-soalan tersebut yang diberikan oleh seorang peguam En Proctor melalui keterangan afidavitnya. Tidak dipertikaikan bahawa jika En

Proctor menjawab soalan-soalan tersebut dengan positif, plaintif pertama akan gagal dalam tuntutannya dan jika dijawab dengan negatif, dia akan berjaya. En Proctor menjawab soalan-soalan tersebut dengan negatif dan apabila afidavitnya dikemukakan di mahkamah, kejadian berikutannya membawa kepada peguam defendan menarik diri daripada mewakili defendan. Seterusnya, mahkamah menangguhkan kes untuk membolehkan defendan mengambil peguam baru. Apabila kes dihadapkan ke mahkamah lagi, peguam kini defendan meminta mahkamah meneruskan kes untuk perbicaraan meskipun kandungan 37 kerana ia tidak adil jika defendan tidak boleh memeriksa balas plaintif-plaintif dan saksi-saksi mereka. Lagi, kandungan 37 merupakan satu percubaan plaintif untuk menetapkan kepada mahkamah cara-cara dan prosedur bagaimana mahkamah patut menjalankan perbicaraan dan ini tidak dibenarkan oleh kes *Ashmore v. Corp of Lloyd's*. Hakim bicara memutuskan bahawa kerana tiada perintah yang dibuat berkenaan kandungan 37, maka pihak-pihak tidak terikat olehnya. Beliau seterusnya memutuskan bahawa kes akan dibicarakan. Maka, rayuan plaintif pertama ini.

Diputuskan:
Oleh Mohktar Sidin HMR (majoriti)

[1] Adalah salah bagi plaintif untuk merujuk kepada kandungan 37 sebagai penghakiman persetujuan. Kandungan 37 tidak lain daripada satu penyelesaian yang dicadangkan oleh plaintif-plaintif yang tidak diterima oleh defendan. Lagipun, afidavit En Proctor tidak mengatakan bahawa defendan bersetuju atau menunjukkan hasrat untuk membayar jumlah wang yang dituntut oleh plaintif pertama.

[2] Satu penghakiman persetujuan mengikat kedua-dua pihak walaupun ianya dimasuki oleh peguam tanpa arahan pihak yang melantiknya. Dalam rayuan semasa, tidak ada penghakiman persetujuan dan peguam terdahulu menarik diri daripada mewakili defendan apabila defendan enggan mengikut nasihatnya.

[3] Disebabkan hakim bicara enggan untuk merekodkan kandungan 37 sebagai penghakiman persetujuan, plaintif-plaintif tidak boleh datang ke mahkamah ini supaya beliau menukar pandangannya itu dan merekodkan kandungan 37 sebagai penghakiman persetujuan. Ianya adalah dalam budi bicara hakim bicara. Hakim bicara betul apabila memutuskan bahawa kandungan 37 adalah percubaan plaintif-plaintif untuk menetapkan kepada mahkamah cara-cara dan prosedur perbicaraan dan itu tidak dibenarkan oleh kes *Ashmore*.

Oleh Mohd Saari Yusoff HMR (majoriti)

[1] Isu untuk diputuskan adalah sama ada terdapatnya penghakiman persetujuan yang berkuatkuasa seperti didakwa plaintif-plaintif. Pihak-pihak kes ini memang bersetuju untuk diikat oleh afidavit En Proctor. Lagipun kes juga ditangguhkan untuk membolehkan En Proctor memfailkan afidavitnya. Tetapi, oleh kerana tiada apa pun untuk menunjukkan bahawa terma-terma penyelesaian direkodkan dan diumumkan oleh mahkamah, maka pendapat saya dalam isu ini adalah negatif.

Oleh Abdul Aziz Mohamad HMR (bertentangan)

[1] Defendan tidak membantah apabila plaintif-plaintif mengemukakan kandungan 37 sebagai penyelesaian di antara mereka. Ini bermakna bahawa defendan bersetuju bahawa kandungan 37 merupakan satu penyelesaian di antara mereka. Lagipun, hakim bicara menangguhkan perbicaraan untuk membolehkan En Proctor memfailkan afidavitnya. Tindakan hakim bicara itu, walaupun bukan satu arahan yang khusus kepada En Proctor untuk memfailkan afidavitnya, menunjukkan bahawa beliau mengiktirafkan kandungan 37 sebagai satu perjanjian penyelesaian di antara pihak-pihak kes ini.

[2] Ini bukan kes penghakiman persetujuan tetapi kes mengenai perjanjian yang dipersetujui di antara pihak-pihak dan yang dikemukakan kepada mahkamah untuk penyelesaian beberapa pertikaian fakta-fakta di antara pihak-pihak. Perjanjian sedemikian adalah lazim dan merupakan ciri yang mustahak dalam perjalanan litigasi sivil. Ianya adalah baik dan digalakkan kerana ianya mempercepatkan penyelesaian kes. Tiada perintah yang perlu dibuat. Pihak-pihak mesti terikat kepadanya walaupun terdapat kemungkinan bahawa akibatnya tidak memihak satu pihak. Jika pihak-pihak tidak terikat oleh perjanjian itu, ianya tidak bermakna dan dianggap tidak memenuhi tujuannya. Kalau mana-mana pihak ingin menarik diri daripada perjanjian itu, pihak tersebut, dengan persetujuan pihak menentang, mesti membuat permohonan rasmi disokong oleh afidavit menerangkan fakta-fakta yang berkaitan.

[3] Hakim bicara tersilap prinsip apabila beliau memutuskan bahawa kandungan 37 tidak mengikat pihak-pihak kes ini kerana tiada perintah mengenainya. Beliau juga tersilap prinsip apabila beliau mempertimbangkan ketidakadilan kepada defendan akibat kandungan 37, terutamanya apabila kemungkinan ketidakadilan itu boleh dijangkakan semasa ianya dibuat.

[4] Kes *Ashmore* menekankan bahawa adalah mahkamah dan bukan plaintif yang mengawal prosiding di dalam sesuatu pertikaian berkenaan cara yang cepat sekali dan yang tidak mahal untuk perjalanan perbicaraan bagi tujuan mencapai keadilan. Kes itu tidak sesuai untuk digunakan sebagai autoriti bahawa ia menetapkan kepada mahkamah cara untuk menyelesaikan pertikaian tersebut apabila pihak-pihak bersetuju cara yang cepat sekali bagi menentukan pertikaian mereka. Mahkamah juga tidak boleh memutuskan bahawa sesuatu pihak tidak terikat oleh perjanjian itu kerana ianya tidak memihak kepada pihak tersebut.

Rayuan ditolak oleh majoriti.]

Case(s) referred to:
Ashmore v. Corp of Lloyd's [1992] 2 All ER 486 ***(refd)***
Leow Seng Huat v. Low Mui Yein [1996] 2 BLJ 466 HC ***(dist)***
Ng Kee Lin v. Ooi Soon Eng [1978] 2 MLJ 214 ***(refd)***
Visia Finance Bhd v. Expert Credit & Leasing Sdn Bhd & Ors [1998] 2 CLJ 845 CA ***(refd)***

For the appellant/plaintiff - Dato' MS Murthi; M/s Murthi & Partners
For the respondent/defendant - A Murali; M/s K Kulasekar & Assoc

[Appeal from High Court, Kuala Lumpur; Suit No: F233-1983]

[Editor's note: This appeal had become academic as the trial had proceeded in compliance with the decision and order of the trial judge. As the defendant was absent, judgment in default was entered against him.]

Reported by Usha Thiagarajah

JUDGMENT

Mokhtar Sidin JCA:
In the court below, the appellant was the first plaintiff and the respondent was the defendant. The second plaintiff is not a party to the present appeal. I will refer to the parties as they were in the High Court.

According to the amended statement of claim, both the plaintiffs own in equal share a piece of land held under EMR No. 2155 for Lot No. 1189 in the Mukim and the District of Klang (hereinafter referred to as "the said land"). Some time on 17 December 1974, both plaintiffs entered into a written joint venture agreement (hereinafter referred to as "the agreement") with the defendant to develop the said land into a housing estate. Under the said agreement the

second plaintiff was to sell 1/2 of his undivided half (1/2) share of the said land to the defendant for RM26,437. By virtue of that, the defendant became the beneficial owner of an undivided 1/4 share in the said land while the first plaintiff remained the owner of an undivided half (1/2) share of the said land. The title to the said land was then handed over to the defendant in order to facilitate him to carry out the obligations under cl. 5 of the agreement:

(a) to apply for conversion of the said Land from agricultural to housing and to pay all the necessary fees for such conversion;

(b) to fill the said Land to a height in accordance with the Town Council stipulations and regulations;

(c) to cause or to take such steps to have the said Land sub-divided and to forward the sub-divisional plans to the Collector of Land Revenue, Klang and on approval being obtained to sub-divide to surrender the Title of the said Land to the Collector of Land Revenue including the payment of all such necessary fees for the said sub-division;

(d) to prepare plans for the construction of single storey terrace houses on the said Land and to construct the houses to a minimum size of 840 sq. feet (20' x 42');

(e) upon the completion of the houses the apportionment or allotment was agreed as follows:

seventy (70%) for the Defendant;

thirty (30%) for the Plaintiffs.

(f) all odd lots after sub-division shall be allotted in the same manner as provided in sub-clause 6 of the said Agreement;

(g) the said Defendant shall complete the construction of the houses within a period of three (3) years from the date of the said Agreement;

(h) sale prices of the houses shall be fixed jointly by the Plaintiffs and the Defendant.

It was not disputed that the defendant was not able to carry out his obligations under the said agreement within the stipulated period and as a result of that the plaintiffs through their solicitors, Messrs K.S. Choo & Company gave notice in writing dated 10 June 1980 to terminate the agreement and demanded the return of the land title. It was also not disputed that at the time when the notice of termination was given, the first plaintiff, at the request of the defendant, had paid the sum of RM17,408 as conversion fees and RM9,000 for drainage and irrigation fees which is the central issue of this appeal.

Upon receiving that notice, the defendant approached the plaintiffs and requested that the said agreement be vacated and in its place proposed a new joint venture agreement. The plaintiffs indicated to the defendant that they would agree to a new joint venture agreement if certain terms be included in the new joint venture agreement which amongst others that the defendant would reimburse the first plaintiff the sum of RM26,408 which was paid by the first plaintiff for conversion, drainage and irrigation fees, the sum of RM27,619.75 paid by the plaintiffs as quit rent and that the defendant deposited the sum of RM60,000 as a security for the completion of the new joint venture agreement. Apparently, the defendant did not agree to those proposals and the new joint venture agreement never came into being. As a result of that breakdown the solicitors for the plaintiffs issued a notice of demand dated 9 February 1983 claiming amongst others the reimbursement of the conversion, drainage and irrigation fees, the defendant's share of the quit rent and assessment already paid by the plaintiffs.

On 9 September 1988, the said land was sold to a third party for the sum of RM550,000. It is common ground that the sale was agreed upon by the plaintiffs and the defendant being the joint owner of the said land. The proceeds of the sale were to be distributed between the plaintiffs and the defendant in accordance with their shareholding as I have stated above.

After the sale the plaintiffs filed their writ and the statement of claim seeking the following:

(i) a declaration that the said agreement had been rescinded;

(ii) damages for breach of the said agreement;

(iii) special damages for the sum of RM47,366.60 (this figure had been increased from the sum of RM27,619.75 due to the payment of quit rent and assessment for the years 1982 to 1988); and

(iv) interest.

From the notes of proceedings and the judgment of the learned judge, the defendant had filed his statement of defence. I have gone through the record of appeal but I could not find the statement of defence which, according to the Rules of the Court of Appeal, should be enclosed in the record. It is clear to me that the solicitors for the plaintiffs had prepared the record without due diligence. There is another document which was referred to by the learned judge in her judgment and by the counsel of both parties in the course of their submissions which could not be found in the record. I will refer to this document later in my judgment.

The first plaintiff's memorandum of appeal stated the following grounds:

> 1. The learned judge erred in law in allowing the respondent to depart from the agreed terms and the manner of resolving the issue of whether the appellant has been paid the conversion fee, drainage and irrigation fee and the quit rent from the proceeds of the sale received from Palm Grove Development Sdn Bhd.
>
> 2. The learned judge erred in law in allowing the respondent to depart from the agreed terms and the manner of resolving the issue of whether the appellant has agreed to accept her portion of proceeds of sale in full and final settlement of all claims against the respondent.

Although the memorandum of appeal gave the grounds for appeal as stated above, it is clear to me following the submissions of the learned counsel for the first plaintiff, that the grievances of the first plaintiff was that the learned trial judge had erred in departing from the consent judgment. It was puzzling to me because I could not trace any consent judgment in the appeal record. Perusing the record I could only find one judgment against which the first plaintiff is now appealing. It is obvious to me that the judgment was not a consent judgment.

In order to understand the nature of the present appeal, I have to identify what was the consent judgment referred to by the first plaintiff's counsel. From the notes of proceedings and the judgment of the learned judge, the consent judgment referred to by the plaintiff's counsel was a proposed settlement as per encl. (37) (which in the judgment referred to as encl. A) prepared by him which was tendered at the hearing in the High Court. This was the document which I have stated earlier could not be found in the appeal record. As such, it is difficult for me to determine what were the actual terms and conditions contained in that document, what more to decide whether the defendant had agreed to the terms and conditions.

From the notes of proceedings, the learned judge on 1 April 1996 recorded as follows:

> Encik Murthi:
>
> We have agreed to a consent judgment to be entered as per the statement of facts by solicitor George Proctor on liquidated damages for RM47,366.60 sen with interest. Judgment on liability as per prayer c & d Statement of Claim.
>
> All I have to do now is to assess quantum of damages as G. Proctor in his affidavit 18.3.96 has said she has not waived her rights (paras 5 & 6).

The response by the counsel for the defendant was recorded as follows:

> Mr. Achan:
>
> I have 2 problems.
>
> Mr. Proctor only served the affidavit on me on 29.3.96. I have not been able to get instruction from my client.
>
> I just have to ask him about the discussion on the joint-venture. On the special damages I need a short adjournment, if my client persists I have to discharge myself.

Apparently, the learned judge refused the application for an adjournment to another date but allowed the defendant's counsel a few hours to get the necessary instructions from the defendant. As a result of that when the case continued in the afternoon the counsel for the defendant informed the court that the defendant did not agree to the terms of the settlement as per encl. (37) and the counsel discharged himself from acting for the defendant. The court then adjourned the matter to another date for the defendant to retain another solicitor.

When this matter came up for continuation before the learned judge, the new counsel for the defendant, Mr. Murali, informed the court that the defendant did not agree to the settlement as proposed by the counsel for the plaintiffs. The defendant's counsel also refused to admit liability in respect of reimbursements as stated in encl. (37) by the plaintiffs' counsel. In other words, neither the defendant nor the counsel for the defendant agreed to the settlement as proposed by the counsel for the plaintiffs as per encl. (37), what more to have it recorded as a consent judgment. It is also clear to me that the defendant's former counsel did not consent to encl. (37) to be recorded as a consent judgment. The former counsel only stated that he wanted confirmation from Mr. Proctor that the defendant had agreed to reimburse the first plaintiff for the amount that she had paid in respect of conversion, drainage and irrigation fees and the quit rent (hereinafter referred to as "that amount"). The court then requested the plaintiffs' counsel to get an affidavit from Mr. Proctor. Mr. Proctor then filed an affidavit dated 18 March 1996 (hereinafter referred to as "the affidavit"). I have narrated above what happened after the affidavit was filed.

It is clear to me that the defendant and his present counsel did not at any time agree to encl. (37) to be a settlement what more to have it recorded as a consent judgment. The learned judge, after hearing the parties refused to record encl. (37) as a consent judgment and ordered a full trial. The first plaintiff

appealed against that decision. As such, for all intents and purposes, there was no consent judgment being recorded. It was wrong for the plaintiffs' counsel to refer to encl. (37) as a consent judgment. In my view, encl. (37) is nothing more than a proposed settlement by the plaintiffs which was never accepted by the defendant.

Before us, the plaintiffs' counsel submitted that the learned judge has erred in rejecting the consent judgment (the proposed settlement as found in encl. 37) because the affidavit of Mr. George Proctor dated 18 March 1996 clearly shows that the defendant has agreed to reimburse the first plaintiff in respect of payments advanced by the first plaintiff. The affidavit, *inter alia*, stated as follows:

> 3. *Vide* a Sale & Purchase Agreement dated 9.9.88, the Plaintiff abovenamed sold their interest in land held under EMR 2155 Lot 1189 Mukim & District of Klang to Palm Grove Development Sdn Bhd for a consideration of RM550,000.00 and upon the terms stated therein.
>
> 4. I confirm that the sum of RM17,408.00 being conversion fee, the sum of RM9,000.00 being Drainage and Irrigation fee and the sum of RM8,694.00 being quit rent have not been reimbursed to the 1st Plaintiff from the proceeds of sale received from Palm Grove Development Sdn Bhd.
>
> 5. The 1st Plaintiff when executing the Agreement dated 9.9.88 with Palm Grove Development Sdn Bhd had at no time agreed to accept the proceeds of sale of the land held under EMR 2155 in full and final settlement of all claims against the Defendant.
>
> 6. In fact *vide* an Agreement dated 9.9.88 between the Plaintiff and the Defendant, it was the 2nd Plaintiff who had agreed at Clause 1 thereof that out of the sum due to him from Palm Grove Development Sdn Bhd a sum of RM137,500.00 could be deducted and paid to the Defendant. At no time had the 1st Plaintiff in any of those Agreements agreed to waive her claim against the Defendant for the Conversion, Drainage and Irrigation fee etc.

The above passages stated that the first plaintiff had expended the sum of RM26,408 for conversion, drainage and irrigation fees and RM8,694 for quit rent and assessment. The first plaintiff did not waive her right for reimbursement for that amount from the defendant. As such she would not accept her half share of the proceeds of RM550,000 as full settlement of her share. The first plaintiff also did not agree that out of the RM550,000, the defendant be paid the sum of RM137,500 as his share of the sale proceeds. The first plaintiff

reserved her right to claim for reimbursement. Only the second plaintiff agreed that the sum of RM137,500 be paid to the defendant from the proceeds of the sale and the first plaintiff is not bound by the concession made by the second plaintiff. I could not find anywhere in the affidavit to show that the defendant had agreed or conceded to reimburse the first plaintiff in respect of that amount.

Mr. George Proctor at para. 4 merely stated that the amount sums paid by the first plaintiff have not been reimbursed in full from the proceeds of the sale. That is all the verification that Mr. Proctor made. This, in my view, was not an agreement on the part of the defendant to reimburse the first plaintiff in respect of that sum. It is obvious to me that the plaintiffs' counsel had erred when he said that the affidavit shows that the defendant had agreed to reimburse the first plaintiff. Reading the affidavit as a whole, I could not find anywhere that the defendant had agreed or gave an indication to pay that amount to the first plaintiff. The plaintiffs' counsel was in error when he stated in this court and the court below that there was a settlement between the parties, what more to call it a consent judgment. The only reason I could think of as to why the plaintiffs' counsel was insistent that the affidavit shows that the defendant had agreed to reimburse that was nothing more than to tie the hands of the defendant, and it was a misnomer on the part of the plaintiffs' counsel in his submission to refer to encl. (37) as a consent judgment. Even though it was pointed out to him that we could not find any consent judgment, the insistence of the plaintiffs' counsel in calling encl. (37) as a consent judgment is nothing more than to mislead the court.

After hearing the parties and perusing the record of appeal, I am of the view that the learned judge was right when in the judgment at p. 5 she stated:

> Now, when enclosure (37) was tendered to me on 25 January 1996 I did not make any order at all, as the matter was adjourned for mention to another date to enable Mr. G. Proctor to file his affidavit. As such it is my considered opinion that there was no Consent Order ...

Before us, the plaintiffs' counsel submitted that the learned trial judge was in error in refusing to record encl. (37) as consent judgment and he cited the case of *Leow Seng Huat v. Low Mui Yein* [1996] 2 BLJ 466 where it was held that the consent order is binding on both parties, whether or not the parties expressly authorise their counsel as to the terms of the consent order. In that case, there was a consent judgment entered earlier between the parties in respect of access to the child by the plaintiff. Contrary to the consent order, the defendant on several occasions, refused the plaintiff to have access to the child. The plaintiff then took up committal proceedings against the defendant. The

defendant in resisting that committal proceedings claimed that she did not agree to the terms and conditions of the consent order. The terms and conditions were agreed upon by her former solicitors without consulting her. In his judgment at p. 471, Hishamuddin J said:

> However, I shall first decide on two points of law that have been raised by learned counsel for the defendant, Encik Tan Beng Hong. The first issue is whether the defendant is bound by the consent order as she had never, in the first place, authorised her former counsel, Encik See, to agree to the consent order. With respect, on this issue, I agree with the submission of the learned counsel for the plaintiff, Encik C E Chuah, that it is irrelevant whether or not Encik See, in agreeing to the consent order, had acted in accordance with the defendant's instruction or otherwise. Assuming that it is true that the defendant had never authorised her former counsel Encik See, to agree to the consent order, that, however, is a problem to be thrashed out only between the defendant and her counsel; such lack of authorization cannot affect the interest of a third party – the plaintiff. It is a principle of law that a party is entitled to rely on the apparent authority of the counsel of the opposing party to compromise: *Wough v. H B Clifford & Sons Ltd* [1982] 1 All ER 1095. Therefore, Encik See, being the defendant's duly appointed counsel at the material time, had the apparent authority to compromise and the plaintiff's counsel was entitled to rely on such ostensible or apparent authority when agreeing to the consent order.

That case could easily be distinguished from the present appeal. There was a consent order entered earlier by the court. The defendant in that case in trying to justify her action to deny the plaintiff access to the child said she did not agree to the terms and conditions of the consent order. The judge in that case held that she was bound by the terms and conditions of the consent order that were agreed upon by her solicitors.

In the present appeal, there was no consent order made whatsoever, only that the plaintiffs' counsel insisted in calling encl. (37) as consent order. I agree with the learned trial judge that the case of *Leow Seng Huat* is not relevant in the present appeal.

As can be seen from that case, there was a consent judgment entered earlier, and that is not the case in the present appeal. Once a consent judgment is entered it would be binding on both parties even though it was entered by the counsel duly appointed without the instruction of one of the parties. In the present appeal, not only there was no consent order entered earlier, but the learned counsel for the defendant withdrew from representing the defendant when the defendant refused to follow instructions from him. As such, that case, as the learned trial judge said, was not relevant to the present appeal.

The plaintiffs' counsel also referred to the decision in *Visia Finance Bhd v. Expert Credit & Leasing Sdn Bhd & Ors* [1998] 2 CLJ 845. In that case the appellant entered into two master agreements with the first respondent for credit facilities. For the due performance of the first appellant's obligations the second and third respondents executed two master agreements. The appellant being dissatisfied with the guarantees given by the second and third respondents requested for additional security to be given. The respondents provided a novation letter as the additional security. The appellant then filed an action against the respondents to recover the sum due under the agreements. The respondents in their defence claimed that the two guarantees were void for uncertainty. In the alternative, the respondents submitted that the two agreements were superseded by the novation letter. At the trial, both counsel agreed that the issue of "whether the guarantees were void for uncertainty" be decided as a preliminary issue first. After hearing the parties, the learned judge ruled that the guarantees were not void for uncertainty and the guarantors were liable and the only issue remaining was the quantum payable to the appellant. A joint application was then made for time to settle the claim. It could be inferred from the above that the respondents had accepted liability and were now negotiating on quantum. However, the respondents' counsel subsequently contended that only the issue of the validity of the guarantees had been decided but not the issue of the novation letter and that the respondents should therefore be permitted to call evidence in respect of the novation letter. The trial judge allowed the respondents' application. On appeal, the Court of Appeal held that both counsel in that case had consented to proceed in a particular manner. An order made by consent in the absence of fraud could only be varied by consent. It would be a denial of justice to permit a party to resile from what his counsel decided for him merely because he lost.

In my view, that case could be distinguished from the present appeal. In that case, counsel of both parties agreed that the issue of the validity of the guarantees be decided first by the court. The court then heard the parties in respect of that issue and made a ruling in that the guarantees were valid and that the issue left was the quantum. In the present appeal, the plaintiffs' counsel attempted to have encl. (37) to be recorded as a consent judgment but on the objection of the defendant, the learned trial judge refused to record encl. (37) as consent judgment and instead made a ruling that there would be a full trial. In my view, the plaintiffs could not now come to this court to insist that the court below change its view and record encl. (37) as consent judgment. That is, in my view, within the discretion of the learned judge which I would not like to disturb.

The learned judge, in my view, was within her right in refusing to record encl. (37) as consent judgment. In my view, the learned judge would be in error if she had acceded to the plaintiffs' counsel's request to have that enclosure be recorded as consent judgment when there were sufficient evidence to show that the defendant and his counsel objected to it. I am of the view, the learned judge was right when she said that this was an attempt by the plaintiffs' counsel to dictate the terms and procedure of the trial which is not permitted by *Ashmore v. Corp of Lloyd's* [1992] 2 All ER 486 where it was held:

> The control of proceedings was always a matter for the trial judge and the parties were not entitled as of right to have their case tried to a conclusion in such manner as they thought fit and if necessary after all the evidence had been adduced and could have no legitimate expectation that such a course would be followed. A party's only legitimate expectation was that he would receive justice, which could only be achieved by assisting the judge and accepting his rulings.

For the above reasons, I agree with my learned brother, Mohd Saari Yusoff JCA that there is no merit in this appeal and the appeal should be dismissed. By majority decision, the appeal is hereby dismissed with costs. The deposit is to be paid to the respondent to account of taxed costs.

Mohd Saari Yusoff JCA:

This is a claim for breach of contract. In the court below, the learned judge ruled that there was no consent order in full force as alleged by the plaintiffs, whereupon the first plaintiff appeals ("the appellant").

The salient facts of the case is as follows. The appellant was the joint owner of land held under EMR 2155 for lot No. 1189 in the Mukim and District of Klang ("the said land"). On 17 December 1974, she entered into a joint venture agreement ("JVA") whereby the respondent would develop the said land into a housing estate. With the proposed housing project in mind, the appellant advanced payments in respect of the following items:

(a) Conversion fee	RM17,408
(b) Drainage and irrigation fee	RM 9,000
(c) Assessment	RM12,264
(d) Quit rent	RM 8,694
	RM47,366

But the respondent failed to develop the said land. Later, upon termination of JVA by the appellant and upon obtaining consent from the respondent, the said land was sold to a third party for RM550,000.

The issue for determination is whether there was a consent order in full force as alleged by the appellant.

From the appeal record, it is noted that on 25 January 1996, M.S. Murthy, learned counsel for the appellant, informed the court that the parties had reached a settlement. The terms of settlement is embodied in appendix A (encl. 37) which reads as follows:

1. Mr. George Proctor the solicitor acting as solicitor for all parties in the Sale & Purchase of the land held under EMR 2155 of 1189 Mukim and District of Klang to Palm Grove Development Sdn. Bhd. is directed to file an affidavit to state:

   (a) Whether or not the sum of RM17,408.00 for conversion fee, the sum of RM9,000.00 for Drainage and Irrigation fee, the sum of RM8,694.00 for quit rent have been reimbursed to the First Plaintiff from the proceeds of the Sale received from Palm Grove Development Sdn. Bhd.

   (b) Whether or not the First Plaintiff had at the time of the execution of the Sale & Purchase to Palm Grove Development Sdn. Bhd. of the land held under EMR 2155 Lot 1189 Mukim and District of Klang agreed with the Defendant to accept her option of the proceeds of sale, in full and final settlement of all claims against the Defendant.

   (c) The parties have agreed to be bound by the statement of facts as deposed to by the said solicitor George Proctor on the 2 issues as set out above and to enter Judgment accordingly.

   (d) In the event the said solicitor George Proctor fails, neglects or refuses to affirm an affidavit as required by the Consent Order above, the parties shall be at liberty to issue a subpoena to compel the said solicitor to give evidence in Open Court.

It may be noted that in para. 1(c) of the Appendix A, the parties agreed to be bound by the affidavit of George Proctor which had not been filed. After appendix A was tendered, the case was adjourned to 1 April 1996 to give time for George Proctor to file affidavit referred to in appendix A. However, on 1 April 1996, dispute arose as to whether appendix A and the affidavit were

binding on the parties. The case was further adjourned to 1 November 1996 for parties to make submission. On 1 November 1996, after hearing submission of both parties, the learned judge made the following finding:

> Now, when Enclosure (37) was tendered to me on 25 January 1996 I did not make any order at all, as the matter was adjourned for mention to another date to enable Mr. G. Proctor to file his affidavit. As such it is my considered opinion that there was no Consent Order made at all. Thus after hearing the submission by both counsel on 1 November 1996, I made a ruling on 27 November 1996 for this case to proceed to trial and for both parties to call their respective witnesses.

In this written submission, M.S. Murthy cited the case of *Visia Finance Bhd v. Expert Credit & Leasing Sdn Bhd & Ors* [1998] 2 CLJ 845. In that case, the court made an order by consent. There, in the court of first instance permission was granted for the respondents to call evidence on novation. But the ruling was reversed by the appellate court on the ground that the respondents were bound by the consent order. Clearly, the facts in that case was distinguishable. Here, from the notes of proceeding, there was nothing to suggest that the terms of settlement were recorded and pronounced by the court.

In the premise and for reasons alluded above, my finding on this issue is in the negative. Hence, I dismiss the appeal with cost.

Abdul Aziz Mohamad JCA:

The plaintiffs in the High Court, who were the joint registered owners of a certain land (EMR 2155 Lot 1189 Mukim and District of Klang), entered into a joint-venture agreement with the defendant in the High Court, a developer, for the development of the plaintiffs' land into a housing estate. Alleging, *inter alia*, that the defendant had been in breach of contract in failing to complete the development within the agreed period, the plaintiffs brought an action against the defendant claiming, besides other reliefs, damages for breach of contract and interest on them, and special damages in the sum of RM47,366.60. That amount comprised sums that the plaintiffs claimed the first plaintiff had paid by way of conversion fees (RM17,408), drainage and irrigation fees (RM9,000), quit rent (RM8,694.60), and rates (RM12,264), which the plaintiffs claimed were the defendant's obligation under the agreement to pay but the first plaintiff had paid for the defendant as an advance, which she was now seeking reimbursement of.

According to the amended statement of claim, to mitigate losses the land had, by agreement of the plaintiffs and the defendant, been sold to a third party by a sale and purchase agreement dated 9 September 1988 for RM550,000, of which the first plaintiff's share amounted to RM225,000. The third party was Palm Grove Development Sdn Bhd.

The defendant in his statement of defence denied the plaintiffs' claim and pleaded frustration, besides other things.

On 25 January 1996, before the trial of the action commenced, the plaintiffs' counsel, in the presence of the defendant's counsel, informed the court: "Kami telah mencapai penyelesaian seperti di Lampiran A". The contents of Lampiran A were as follows:

1. Mr. George Proctor the Solicitor acting as Solicitor for all parties in the Sale and Purchase of the land held under EMR 2155 Lot 1189 Mukim and District of Klang to Palm Grove Development Sdn Bhd is directed to file an Affidavit to state.

   (a) Whether or not the sum of RM17,408.00 for conversion fee, the sum of RM9,000.00 for Drainage and Irrigation fee, the sum of RM8,694.00 for quit rent have been reimbursed to the 1st Plaintiff from the proceeds of the Sale received from Palm Grove Development Sdn Bhd.

   (b) Whether or not the 1st Plaintiff had at the time of the execution of the Sale and Purchase to Palm Grove Development Sdn Bhd of the land held under EMR 2155 Lot 1189 Mukim and District of Klang agreed with the Defendant to accept her portion of the proceeds of sale, in full and final settlement of all claims against the Defendant.

2. The parties have agreed to be bound by the statement of facts as deposed to by the said Solicitor George Proctor on the 2 issues as set out above and to enter Judgment accordingly.

3. In the event the said Solicitor George Proctor fails neglects or refuses to affirm an Affidavit as required by the consent Order above, the parties shall be at liberty to issue a subpoena to compel the said solicitor to give evidence in open court.

At that stage, according to the aforesaid statement by the plaintiffs' counsel to the court, Lampiran A constituted a settlement between the parties that was tendered to the court. According to Lampiran A, there were two issues of fact between the parties and they had agreed that they would abide by the evidence of Mr. Proctor, meaning they would accept whatever he might say about the two questions of fact to be true, that his evidence be solely by affidavit, and

that the court direct him to file the affidavit. The two questions of fact were expressed by sub-paras. (a) and (b) of para. 1 of Lampiran A and concerned the first plaintiff only. The answers to those questions were needed to ascertain whether, on the facts, the receipt by the first plaintiff of her share of the proceeds of sale of the land settled all her claims against the defendant, particularly the claim for reimbursement of the conversion fee, the drainage and irrigation fee and the quit rent. Apparently no dispute arose as regards the rates (RM12,264). If Mr. Proctor answered the two questions of fact in the affirmative, the first plaintiff would fail in her claim. If Mr. Proctor answered them in the negative, the first plaintiff would succeed.

The defendant's counsel did not object to the plaintiffs' counsel's tendering of Lampiran A as a settlement between the parties. That in my view meant that he agreed that Lampiran A constituted a settlement between the parties. The trial judge in fact postponed the trial to another date for mention to enable Mr. Proctor to file his affidavit. That act of the trial judge, although it was not an express directive to Mr. Proctor to file his affidavit, signified to me that the judge recognized Lampiran A as an agreement between the parties that she then began to put into effect. If she had not recognized Lampiran A as an agreement between the parties, the judge would not have been willing to let Mr. Proctor file his affidavit.

Mr. Proctor affirmed his affidavit on 18 March 1996. He answered the two questions of fact in the negative. I quote paras. 4, 5 and 6 of his affidavit:

> 4. I confirm that the sum of RM17,408.00 being conversion fee, the sum of RM9,000.00 being Drainage and Irrigation fee and the sum of RM8,694.00 being quit rent have not been reimbursed to the 1st Plaintiff from the proceeds of Sale received from Palm Grove Development Sdn Bhd.
>
> 5. The 1st Plaintiff when executing the Agreement dated 9.9.88 with Palm Grove Development Sdn Bhd had at no time agreed to accept the proceeds of sale of the land held under EMR 2155 in full and final settlement of all claims against the Defendant.
>
> 6. In fact *vide* an Agreement dated 9.9.88 between the Plaintiff *(sic)* and the Defendant, it was the 2nd Plaintiff who had agreed at Clause 1 thereof that out of the sum due to him from Palm Grove Development Sdn Bhd a sum of RM137.500.00 could be deducted and paid to the Defendant. At no time had the 1st Plaintiff in any of those Agreements agreed to waive her claim against the Defendant for the Conversion, Drainage and Irrigation fee etc.

On 1 April 1996, when Mr. Proctor's affidavit was before the court, the defendant's counsel informed the court that he had only been served with the affidavit and he had not been able to get instructions from the defendant, whereupon the proceedings were postponed to the afternoon, when the defendant's counsel informed the court: "In view of what has transpired I wish to consider whether I should discharge myself. I need one week to consider". On 18 April 1996, the defendant's counsel having decided to discharge himself, and the defendant having agreed and the plaintiffs' counsel agreeing, the court allowed the discharge of the defendant's counsel (Encik Achan).

On 9 October 1996, the defendant being now represented by different solicitors and a different counsel (Encik A. Murali), both parties agreed to proceed with submission on, to quote from the notes, "sama ada persetujuan yang dicapai pada 25 January 1996 mengikat kedua-dua pihak". To judge from what the plaintiffs' counsel informed the court, the need to determine that question arose because on 7 October 1996 the defendant's new solicitors had written to the plaintiffs' solicitors to say that the agreement entered into by counsel for both sides was ineffective in law and that therefore the defendant was not bound by it. The submission proceeded on 1 November 1996, and on 20 December 1996 the trial judge ruled that the agreement did not bind the parties and ordered the case to be tried on the oral evidence of witnesses. Hence the first plaintiff's appeal to this court.

I should mention that the agreement at Lampiran A was not in the appeal record. The appellant's counsel explained to us that the only copy had been tendered to the court. It became encl. (37), and I shall refer to it as such henceforth. It was, however, accepted that the contents of encl. (37) were as set out at p. 3 of the judgment. The same contents of encl. (37) were set out in a letter dated 29 January 1996 from the plaintiffs' solicitors to Mr. Proctor. There was, however, a difference in paragraph-numbering; between the two texts, and because I prefer the paragraph-numbering of the text in that letter as being the correct one, the contents of encl. (37) that I have set out is a quotation from that letter.

According to the notes, in the court below the defendant's counsel did not argue that encl. (37) did not constitute an agreement between the parties beyond saying that there had been a miscommunication between his client and his client's former counsel. What the defendant's counsel did was to urge the court to use its discretion to order the case to proceed to trial notwithstanding the agreement because it would be unjust to the defendant not to be able to cross-examine the plaintiffs and their witnesses, including Mr. Proctor. To fortify his plea,

the defendant's counsel cited *Ashmore v. Corp of Lloyd's* [1992] 2 All ER 486 for the proposition that it is not for parties or their counsel to dictate to the court what evidence is to be adduced and what procedure is to be adopted, obviously taking the view that the agreement in encl. (37) constituted such a dictating.

When the judge ordered the action to proceed to trial, the reason she gave was that since the court had not made any order on encl. (37) the parties were not bound by the agreement. In her written grounds for the appeal, she did say that as she had made no order on encl. (37) there was no consent order but she did not say that for that reason the parties were not bound by the agreement. Instead she gave reasons that were in consonance with the submission of the defendant's counsel. This was what she said:

> Now, when Enclosure (37) was tendered to me on 25 January 1996 I did not make any order at all, as the matter was adjourned for mention to another date to enable Mr. G. Proctor to file his affidavit. As such it is my considered opinion that there was no Consent Order made at all. Thus after hearing the submission by both counsel on 1 November 1996, I made a ruling on 27 November 1996 for this case to proceed to trial and for both parties to call their respective witnesses. I made the said ruling after scrutinising the terms of the proposed Consent Order. It was clear to me that by the terms of the said order the parties were endeavouring to dictate to this Court on how it should conduct its proceedings. Furthermore it was also clear that Mr. G. Proctor's affidavit favoured the plaintiff's case. As such, to my mind, it would cause great injustice to the Defendant if he were not allowed to cross-examine the First Plaintiff and her witnesses, (if any). I adopt what was stated by the House of Lords in the *ASHMORE* case *(supra)*:
>
> > The control of proceedings was always a matter for the trial judge and the parties are not entitled **as of right** to have their case tried to a conclusion in such a manner as they thought fit ...
> >
> > A party's only legitimate expectation was that he would **receive justice,** which could only be achieved by assisting the judge and accepting his rulings. (emphasis added).

I should mention that according to the notes the ruling was given on 20 December 1996 and not, as the judge said, on 27 November 1996.

The judge did not appear to give any consideration to the explanation of the defendant's counsel that there had been a miscommunication between the defendant and his former counsel about encl. (37), and to my mind rightly so, because there was no evidence before the judge as to the actual nature of the

alleged miscommunication to enable her to conclude that this was an exceptional case where an agreement made by counsel or solicitors ought not to bind the client. The defendant's counsel did cite *Ng Kee Lin v. Ooi Soon Eng* [1978] 2 MLJ 214, but that was a case that concerned a consent order, namely an order of court made against a party with his consent on the application of the other party, as opposed to an agreement between parties as in this case, and, what is more important, it was a decision on a formal application by the party against whom the order was made for a variation of the order on the ground of mistake and therefore there were affidavits setting out facts relating to the alleged mistake to enable the court to decide that a variation was justified in law.

To me it was obvious that this was not a case of a consent order but a case of an agreement reached between the parties (or their counsel or solicitors) and manifested to the court as to the manner of resolving certain issues of fact that existed between them. They agreed to be bound by the evidence of Mr. Proctor as regarded those facts, that is to say, to accept whatever he might affirm by affidavit about those facts to be true. Agreements between parties and manifested to the court are a common and essential feature of the conduct of civil litigation. Parties agree to all sorts of things about matters relevant to the case between them. They agree about documents. They agree about facts. They agree to limit issues and not to proceed on certain pleaded issues. They even agree to accept allegations of fact by the other side as true only for the particular case because they are confident of succeeding on the law in any case or because the law on the particular matter is such that it would make no difference what the actual facts were. Such agreements are good and are to be encouraged because they expedite the disposal of cases. No orders need be made on them. The fact of the agreements is merely placed on record in some way or other and the parties are bound by them. They have to be bound by them, even though the consequence of them may turn out to be unfavourable to one party, as otherwise they will mean nothing and will not serve their purpose. If any party wishes to resile from such an agreement or to vary any term of it he must, unless the other party agrees, make a formal application supported by an affidavit setting out the facts that are relevant to the ground for the application.

Holding those views, I was of opinion that the judge erred in principle when she ruled that the agreement did not bind the parties because she had not made an order in terms of the agreement. She also erred in principle when she gave consideration to the unfairness to the defendant of the consequence of the

agreement in deciding not to uphold the agreement, particularly when the likelihood of the consequence could not but have been foreseen when the agreement was made.

As to *Ashmore*, the passage adopted by the judge was from the editorial summary of the House of Lords' decision and has to be understood in the context in which the relevant parts of original speeches were delivered. In that case the defendants (Lloyd's) applied for preliminary points of law to be argued and determined before hearing evidence, as, depending on the decision on the points of law, the scope of the necessary evidence might be reduced or the action could be decided without hearing evidence. The plaintiffs opposed the application. They wanted the case to go the standard way of hearing evidence and submission on evidence and the law. The trial judge (Gatehouse J) allowed the defendants' application. The plaintiffs appealed to the Court of Appeal, who allowed the appeal. In the Court of Appeal, Ralph Gibson LJ, speaking of counsel for the plaintiffs, remarked at p. 493 f:

> He claimed in particular that it was wrong thus to take the conduct of the proceedings out of the hands of the plaintiffs and thereby to disappoint the plaintiffs in their legitimate expectation that the trial would proceed to a conclusion upon the evidence to be adduced.

The plaintiffs' stand was that it was their right to go the whole way in the conduct of their case notwithstanding that the prior determination of points of law might obviate or reduce the need for the adducing of evidence. Ralph Gibson LJ agreed with the plaintiffs' stand. He thought that there was "considerable force in those submissions": p. 493 g. To that, Lord Templeman, on the defendants' appeal to the House of Lords, said at p. 493 g-h:

> My Lords, I disagree; the control of the proceedings rests with the judge and not with the plaintiffs. An expectation that the trial would proceed to a conclusion upon the evidence to be adduced is not a legitimate expectation. The only legitimate expectation of any plaintiff is to receive justice. Justice can only be achieved by assisting the judge and accepting his rulings.

Earlier on, Lord Roskill in his speech had said, at p. 488:

> The Court of Appeal appear to have taken the view that the plaintiffs were entitled as of right to have their case tried to conclusion in such manner as they thought fit and if necessary after all the evidence on both sides had been adduced. With great respect, like my noble and learned friend, I emphatically disagree. In the Commercial Court and indeed in any trial court it is the trial judge who has control of the proceedings. It is part of his duty to identify

> the crucial issues and to see they are tried as expeditiously and as inexpensively as possible. It is the duty of the advisers of the parties to assist the trial judge in carrying out his duty. Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn. Litigants are only entitled to so much of the trial judge's time as is necessary for the proper determination of the relevant issues. That was what Gatehouse J, in my view entirely correctly, sought to achieve by the order which he made, an order which as all your Lordships agree should be restored.

It is evident that the emphasis on the court, and not the plaintiff, being in control of the proceedings was made by the two Law Lords in the context of a dispute as to the most expeditious and inexpensive way of conducting the trial of an action so as to achieve justice, the plaintiffs insisting on the less expeditious and more expensive and time-consuming way. Those dicta of the two Law Lords are not, in my opinion, appropriate to be used as authority for saying that where parties have agreed on an expeditious way of determining the dispute between them, they are dictating to the court about the manner of resolving the dispute and therefore the court may, for no better reason than that the manner chosen and agreed to will result adversely for one party, hold him not bound by the agreement.

For the reasons that I have set out, I was of the view that the appeal should be allowed.

It seemed to me from the notes of proceedings that before the trial judge the plaintiffs' counsel took the stand that the affidavit evidence of Mr. Proctor entitled the first plaintiff (the appellant) to judgment for special damages and both the plaintiffs to general damages for breach of contract, the quantum to be assessed. In the written outline of submission of the appellant, it was prayed that the appeal be allowed and that judgment be entered in terms of prayers (e) and (f) in the amended statement of claim, which prayers were for special damages in the sum of RM47,366.60 and for interest on the sum. I missed the opportunity to ask the appellant's counsel about the position as regards general damages. Be that as it may, being of the view that the appeal should be allowed, I would give judgment for the appellant as sought in the outline of submission.

Before us, the defendant's (respondent's) counsel argued that the appeal had become academic because, in compliance with the decision and order of the trial judge, the trial had proceeded and, the defendant being absent, judgment in default had been entered against him. The appellant's counsel replied that the appellant would not feel safe with a judgment in default because the respondent might apply to set it aside.

I was of the view that in principle, and also on a consideration of costs, the appellant should be entitled to show, by having her appeal decided, that she was right in bringing the appeal, although I also agreed that a judgment on the appeal would be more secure for her than a judgment in default.